**PUBLIC PROSECUTOR**

**v.**

**LIN LIAN CHEN**

SUPREME COURT, KUALA LUMPUR
ABDUL HAMID OMAR LP
EDGAR JOSEPH JR SCJ
GUNN CHIT TUAN SCJ
[SC CRIMINAL APPEAL NO. 05-104-90]
9 SEPTEMBER 1992

***CRIMINAL PROCEDURE:*** *Dangerous Drugs - Appeal against acquittal and discharge of respondent - Sections 39B(1)(a), 39B(2) of Dangerous Drugs Act 1952 - Whether defence entitled to introduce exculpatory cautioned statement during the case for prosecution when prosecution did not intend it as part of the prosecution case - Whether respondent had custody or control of the drugs found in the car - Whether mere knowledge of the presence of the drugs without more would be sufficient to hold custody or control - Whether respondent had knowledge of the drugs - Federal Court case of Mohd Noor bin Jantan v. PP distinguished.*

***EVIDENCE:*** *Circumstantial evidence - Grave suspicion insufficient to attract presumption under s. 37(d), (h) of Dangerous Drugs Act 1952 - Hearsay evidence - Admissibility of cautioned statements.*

***WORDS AND PHRASES:*** *Section 37(d) Dangerous Drugs Act 1952 - "anything whatsoever containing any dangerous drug" - Drug found in vehicle - Whether ipso facto it falls within s. 37(d).*

The Public prosecutor had appealed against the decision of the Kuala Lumpur High Court acquitting and discharging the respondent of a charge of trafficking in 578.94g. of heroin, an offence under s. 39B(1) of the Dangerous Drugs Act 1952 ("the Act") and punishable under s. 39B(2) of the Act.

The police had seized the following from the Honda car driven by the respondent:

(a) a plastic bag containing six newspaper packages each of which had heroin from the footwell of the rear nearside of passenger's seat;

(b) another newspaper package containing heroin, a registration card and car licence of the Honda, both in the name of Lim Hooi Yong, several business cards bearing the name James Goh Liong Sin, all of which were found in the glove compartment; and

(c) a cigarette packet containing six cigarettes with traces of heroin on the dash board.

During the trial the Judge, distinguishing *Mohd. Noor bin Jantan v. PP* [1979] 2 MLJ 289 FC on the facts, allowed the defence to introduce an exculpatory cautioned statement of the respondent during the course of the prosecution case through the investigating officer although the recording officer was not called by the prosecution.

In that case, Suffian LP had held that where "the recording officer is not called by the prosecution, he must be called by the defence during the course of the defence case for this purpose."

The trial Judge had held there was no case to answer on two grounds, namely:

(a) lack or absence of evidence as to the expertise of the chemist in the analysis of dangerous drugs; and

(b) insufficient evidence of custody, control or possession of the drugs.

The appeal turned on the second ground. It was argued by the prosecution, relying on the statutory presumption in s. 37(d) of the Dangerous Drugs Act 1952, that the respondent had custody or control of the Honda as he was its sole occupant at the material time, even though he was not the registered owner and so, the seized drugs, although not recovered from a specially constructed compartment were also in his custody or control and therefore "until the contrary is proved, [the accused] must be deemed to have been in possession of such drug, and shall, until the contrary is proved, be deemed to have known the nature of such drugs."

The prosecution had also argued that unless the recording officer was called by the prosecution, the cautioned statement of the accused, could in no circumstances, be introduced during the case for the prosecution at the request of the accused.

**Held:**

**[1]** The presumption under s. 37(d) of the Act did not arise as the vehicle in which the drugs was carried does not *ipso facto* fall within the words "anything whatsoever containing any dangerous drug." (The proposition of law enunciated by Thomson J (as he then was) in *Tong Peng Hong v. PP [1955]* 21 MLJ 232 affirmed).

**[2]** The presumption under s. 37(h) of the Act also did not arise as at the material time the drugs were not found concealed in a specially constructed compartment of the Honda car.

**[3]** The circumstantial evidence relied on by the prosecution was insufficient to prove that the respondent had custody or control of the seven newspaper packages which contained the drugs or the cigarette packet in which were the six cigarettes containing traces of heroin. More particularly, there was not even proof that the respondent knew of the presence of the seven newspaper packages or the cigarette packet much less proof that the respondent knew of the presence of the drugs **in** the seven newspaper packages or in the cigarette packet. For example, no evidence was adduced as to whether the seven newspaper packages or the cigarette packet had been dusted for finger prints or as to whether the respondent's hands were examined for traces of heroin nor was there anything suspicious about the respondent's behaviour.

**[4]** The decision of the trial Judge allowing the defence to introduce the exculpatory statement of the respondent through cross-examination of the investigating officer during the case for prosecution, was correct. The defence was entitled to elicit by cross-examination of prosecution witnesses, oral evidence or documentary evidence in order to destroy the case for the prosecution or to support its own case, subject to the principle of crown privilege.

**[5]** The reason for holding (4) *supra*, was that the statement was that of the respondent who had personal knowledge of the facts stated therein and who had authenticated it by signing it. In other words, it was the respondent who was the author thereof and who had himself wished it to be admitted, it being acknowledged by him in the cautioned statement itself that it was made voluntarily after due administration of the statutory caution.

*[Appeal of the prosecution dismissed. Order of acquittal and discharge affirmed.]*

[**Bahasa Malaysia** Translation of Headnote]

***PROSEDUR JENAYAH:*** *Dadah Berbahaya - Rayuan terhadap pembebasan dan pelepasan responden - Seksyen 39B(1)(a) & 39B(2) Akta Dadah Berbahaya 1952 - Samada pihak pembela berhak untuk memperkenalkan pernyataan beramaran bersifat "exculpatory" semasa kes untuk pendakwa walaupun pihak pendakwa tidak berniatkannya sebagai sebahagian daripada kes pendakwaan - Samada responden mempunyai jagaan atau kawalan ke atas dadah yang dijumpai dalam kereta - Samada pengetahuan akan kehadiran dadah semata-mata tanpa butir-butir yang lain sudah mencukupi untuk membuktikan penjagaan atau kawalan - Samada responden mempunyai pengetahuan mengenai dadah tersebut - Kes Mahkamah Persekutuan Mohd. Noor bin Jantan v. PP dibezakan.*

***UNDANG-UNDANG KETERANGAN:*** *Keterangan ikut keadaan - Syak kuat tidak cukup untuk menarik anggapan di bawah s. 37(d) & (h) Akta Dadah Berbahaya 1952 - Keterangan dengar cakap - Kebolehterimaan pernyataan beramaran.*

***PERKATAAN & ISTILAH:*** *Seksyen 37(d) Akta Dadah Berbahaya 1952 - "Apa-apa sahaja yang mengandungi sebarang dadah berbahaya" - Dadah dijumpai dalam kenderaan - Samada ipso facto tergolong dalam lingkungan s. 37(d).*

Pendakwa raya telah membuat rayuan terhadap keputusan Mahkamah Tinggi Kuala Lumpur yang telah membebaskan dan melepaskan responden dari tuduhan mengedar 578.94 g heroin, suatu kesalahan di bawah s. 39(B)(1) Akta Dadah Berbahaya 1952 ("Akta tersebut") dan boleh dijatuhkan hukuman di bawah s. 39B(2) Akta tersebut.

Pihak polis telah merampas benda-benda berikut dari kereta Honda yang dipandu oleh responden.

(a) suatu beg plastik yang mengandungi enam bungkusan akhbar yang setiap satunya mempunyai heroin dari bahagian belakang tempat letak kaki bersebelahan dengan tempat duduk penumpang;

(b) satu lagi bungkusan akhbar yang mengandungi heroin, sebuah buku pendaftaran dan lesen kereta Honda tersebut, kedua-duanya didaftar di bawah nama Lim Hooi Yong, beberapa keping kad perniagaan yang mempunyai nama James Goh Liong Sin, kesemuanya dijumpai dalam petak sarung; dan

(c) sebuah kotak rokok yang mengandungi enam batang rokok dengan kesan-kesan heroin pada permukaannya.

Semasa perbicaraan, Hakim, dalam membezakan kes *Mohd. Noor bin Jantan v. PP* [1979] 2 MLJ 289 MP atas fakta-faktanya, telah membenarkan pihak pembela untuk memperkenalkan pernyataan beramaran responden yang bersifat "exculpatory" semasa perjalanan kes pendakwaan melalui pegawai penyiasat sungguhpun pegawai perakaman tidak dipanggil oleh pihak pendakwa.

Dalam kes tersebut, Suffian LP telah memutuskan bahawa di mana "pegawai perakaman tidak dipanggil oleh pihak pendakwa beliau mestilah dipanggil oleh pihak pembela semasa perjalanan kes pembela bagi tujuan ini."

Hakim perbicaraan telah memutuskan bahawa tiada kes untuk dijawab berdasarkan kepada dua alasan, iaitu:

(a) kekurangan atau ketiadaan bukti berhubung dengan kepakaran ahli kimia dalam penganalisaan dadah berbahaya; dan

(b) Kekurangan bukti mengenai jagaan, kawalan atau pemilikan dadah tersebut.

Hanya alasan kedua sahaja dibicarakan. Pihak pendakwaan yang bergantung kepada anggapan statutori di bawah s. 37(d) Akta Dadah Berbahaya 1952, telah menghujahkan bahawa responden mempunyai jagaan atau kawalan ke atas kereta Honda tersebut memandangkan beliau merupakan satu-satunya orang yang berada dalam kereta itu pada waktu yang berkenaan, walaupun beliau bukan merupakan pemilik berdaftarnya. Oleh itu, dadah yang dirampas itu, walaupun tidak dijumpai dari petak yang dibina khas adalah juga berada di bawah jagaan atau kawalannya dan oleh yang demikian "sehingga yang bertentangan itu dibuktikan, (tertuduh) hendaklah disifatkan sebagai memiliki dadah sedemikian, dan hendaklah, sehingga yang bertentangan itu dibuktikan, disifatkan sebagai mengetahui sifat dadah sedemikian."

Pihak Perayu juga telah menghujahkan bahawa melainkan pegawai perakaman dipanggil oleh pihak pendakwa, pernyataan beramaran tertuduh, tidak boleh dalam apa jua keadaan diperkenalkan semasa kes untuk pendakwaan atas permintaan tertuduh.

**Diputuskan:**

**[1]** Anggapan di bawah s. 37(d) Akte tersebut tidak timbul memandangkan kenderaan dalam mana dadah berkenaan dijumpai tidak *ipso facto* tergolong dalam lingkungan perkataan "apa-apa jua yang mengandungi sebarang dadah berbahaya." (Kenyataan undang-undang yang diterangkan oleh Thomson J (pada waktu itu) dalam kes *Tong Peng Hong v. PP* [1955] 21 MLJ 232 disahkan).

**[2]** Anggapan di bawah s. 37(h) Akta tersebut juga tidak bangkit kerana pada masa material dadah tersebut tidak dijumpai tersembunyi dalam sebuah petak yang dibina khas dalam Honda tersebut.

**[3]** Pergantungan pihak pendakwaan kepada keterangan ikut keadaan adalah tidak mencukupi bagi tujuan membuktikan bahawa responden mempunyai jagaan atau kawalan terhadap tujuh bungkusan akhbar yang mengandungi dadah tersebut dan kotak rokok yang terdapat kesan dadah tersebut pada permukaannya. Lebih-lebih lagi tiada sebarang bukti bahawa responden mempunyai pengetahuan akan kehadiran tujuh bungkusan akhbar atau kotak rokok tersebut. Malah, responden juga tidak mempunyai pengetahuan terhadap kehadiran dadah dalam bungkusan ataupun kotak rokok tersebut. Misalnya tidak ada sebarang keterangan dikemukakan sama ada bungkusan akhbar ataupun kotak rokok telah diperiksa untuk kesan cap jari atau tangan responden mengandungi kesan-kesan heroin ataupun sebarang tingkah laku responden yang membawakan prasangka.

**[4]** Keputusan Hakim perbicaraan yang membenarkan pihak pembela untuk mengemukakan pernyataan bersifat exculpatory melalui pemeriksaan balas pegawai penyiasat semasa kes untuk pendakwaan adalah sah. Pihak pembela berhak melalui pemeriksaan balas saksi-saksi pihak pendakwa mencungkil keterangan lisan atau keterangan dokumentar bagi memusnahkan kes pihak pendakwa atau menyokong kesnya sendiri, kecuali tertakluk kepada prinsip "crown privilege."

**[5]** Keputusan yang terdapat di perenggan (4) dicapai atas alasan bahawa pernyataan tersebut itu dibuat oleh responden yang mempunyai pengetahuan terhadap fakta-fakta yang terkandung dalam pernyataan tersebut dan ia telah mengesahkannya dengan menurunkan tandatangannya. Dalam kata lain, respondenlah pengarang pernyataan tersebut dan beliau sendiri inginkan pernyataan tersebut diterima dan telah mengakui dalam pernyataan beramaran itu sendiri bahawa ia membuat pernyataan tersebut secara sukarela selepas amaran statutori diberi.

*[Rayuan pihak pendakwa ditolak. Perintah pembebasan dan pelepasan disahkan]*

**Cases referred to:**
*Mohd. Noor bin Jantan v. PP [1979] 2 MLJ 289* ***(not foll)***
*Tong Peng Hong v. PP [1955] 21 MLJ 232* ***(affirmed)***
*Chang Kim Siong v. PP [1968] 1 MLJ 36 FC* ***(foll)***
*Tan Siak Heng v. Rex [1950] 16 MLJ 214* ***(refd)***
*Ibrahim v. The King [1914] AC 599* ***(refd)***

**Legislation referred to:**
Bankers' Books (Evidence) Act 1949, s. 3
Criminal Procedure Code, s. 113(1)
Dangerous Drugs Act 1952, ss. 37(d), (h), 37A(1), 39B(1)(a), (2)
Evidence Act 1950, s. 32(b)
Internal Security Act 1960, s. 75(1)
Prevention of Corruption Act 1961, s. 15(1)

*For the appellant - Stanley Isaacs SFC; AG's Chambers*
*For the respondent - Manjeet Singh Dhillon; M/s. Manjeet Singh Dhillon*

**JUDGMENT**

**Edgar Joseph Jr SCJ:**

The respondent was prosecuted in the High Court of the Federa1 Territory before Mr. Justice Mokhtar Abdullah upon the following charge:

> That you, on 28 March 1987 at about 2.40 p.m., at the Stadium Negara Car Park, Jalan Stadium, in the district of Kuala Lumpur, Wilayah Persekutuan, did traffick in a dangerous drug, to wit 578.94g. of heroin, and you have thereby committed an offence under s. 39B(1)(a) Dangerous Drugs Act 1952 (Revised 1980) and punishable under s. 39B(2) of the said Act.

According to the evidence led by the prosecution, at about 2.15 p.m. on 28 March 1987, acting on information received, a party of police officers headed by ASP Yusoff bin Mohamad, had laid an ambush at the Stadium Negara Car Park, Jalan Stadium, Kuala Lumpur. Some twenty five minutes later, a Honda motor car driven by the respondent had arrived at the car park and, as soon as he had pulled up and switched off his engine, ASP Yusoff gave a pre-arranged signal to his party of men, whereupon they pounced upon the respondent while he was still seated in the driver's seat, placed him under arrest, and very soon after that, handcuffed him and took possession of the car keys.

An immediate search of the Honda by ASP Yusoff resulted in the recovery from the footwell of the rear nearside of passenger's seat, a plastic bag inside which was another plastic bag containing six newspaper packages each of which contained a pink granular substance.

The Honda was then driven to the Narcotics Division Office by a member of the ambush team, where it was subjected to a second search, resulting in the recovery of the following articles:

(1) a newspaper package containing a pink granular substance from the glove compartment;

(2) registration card and car licence of the Honda, both in the name of one Lim Hooi Yong, from the glove compartment;

(3) several business cards bearing the name James Goh Liong Sin from the glove compartment; and

(4) a cigarette packet containing six cigarettes on the dash board.

The evidence led by the prosecution also disclosed that:

(a) the Honda though registered in the name of Lim Hooi Yong, actually belonged to James Goh Liong Sin;

(b) the hotel register of the Emerald Hotel, indicated that one Koay Nian Taik was registered as the occupant of room 414 from 7.50 p.m. on 27 March 1987 until 1.50 p.m. 28 March 1987 and the Honda was registered against that room; and

(c) during interrogation by ASP Yusoff, the respondent had said that James Goh was at the Emerald Hotel.

When the pink powdery substance found in the seven newspaper packages (six recovered from a plastic bag in the footwell of the rear nearside passenger's seat and one from the glove compartment) was analysed by the Government Chemist it was found to contain, in all, 578.94 g of heroin, a dangerous drug within the meaning of the Dangerous Drugs Act 1952. It was this substance which constituted the subject matter of the offence charged. The cigarette packet contained 6 cigarettes, each of which the Chemist had found to contain traces of heroin.

At the trial, Counsel for the respondent had, in the course of his cross examination of the investigation officer Inspector Hassan Jalaludin bin Abdul Malik, attempted to introduce an exculpatory cautioned statement of the respondent recorded by Inspector Lai Joo Wah who, however, was not called by the prosecution. The attempt was resisted by the learned Deputy who appeared for the prosecution, reliance being placed upon the Federal Court decision of *Mohd. Noor bin Jantan v. PP* [1979] 2 MLJ 289 where Suffian LP speaking for that Court had to answer the question:

> whether or not the defence is entitled in law to cause the prosecution to tender as evidence the cautioned statement recorded from an accused person during the course of the case for the prosecution when the prosecution does not intend to introduce it as part of the prosecution case?

His Lordship answered the question thuswise:

> The prosecution is free to tender or not in evidence the cautioned statement; but if the recording officer gives evidence the defence is entitled to cause him to tender it in evidence even though the prosecution does not itself want to introduce it as part of its case. But if the recording officer is not called by the prosecution, he must be called by the defence during the course of the defence case for this purpose.

The trial Judge however overruled the objection of the prosecution and allowed Counsel for the respondent to introduce the cautioned statement which was thereupon marked as a defence exhibit, namely, D22, being of the view that *Mohd Noor Jantan's* case was distinguishable on the facts.

Of the respondent's cautioned statement made the day after his arrest, the trial Judge had this to say:

> The cautioned statement, made one day after the accused's arrest, was exculpatory in nature and made references to Ah Schen (as the owner of the Honda Accord DP 5212) and Ah Tik, both staying at Room 414, Hotel Emerald. The accused described how he was asked by one Mr. Soh, a friend of Ah Schen, to drive the car to the car park at Stadium Negara to await an old man and how the plastic bag containing the offending drug was placed in the car by the old man. The facts disclosed in the cautioned statement bore striking similarities to the

facts enumerated earlier pertaining to the car DP 5212, James Goh Lian Sin and Koay Nian Taik of Room 414, Hotel Emerald, Kuala Lumpur. These facts disclosed in the course of the prosecution case tended to show that the accused's explanation in his cautioned statement as to the circumstances whereby he came to be driving the car could probably or reasonably be true.

In the event, at the close of the case for the prosecution, the trial Judge acceded to a submission by Counsel for the respondent that there was no case to answer on two separate grounds; namely:

(1) lack or absence of evidence as to the expertise of the chemist in the field of analysis of dangerous drugs; and

(2) insufficient evidence of custody, control or possession of the drugs the subject matter of the charge.

Having regard to the view we took of the second ground upon which the trial Judge based his order of acquittal and discharge, it was unnecessary for us to consider his first ground.

Before us, as regards the second ground upon which the trial Judge based his order of acquittal and discharge, it was argued by the learned Deputy, in effect, that because the respondent was, at the material time, the sole occupant of the Honda, which although not owned by him, was in his custody or under his control, consequently, the seven newspaper packages which contained the drugs recovered from the Honda, although not recovered from a specially constructed compartment therein, were, *ipso facto,* or in other words, as a matter of law, also in his custody or control, and therefore there was a case for the respondent to answer regard being had to the provisions of s. 37(d) of the Dangerous Drugs Act 1952, which says:

37(d) any person who is found to have had in his custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug.

With respect, we considered that that submission went too far and was clearly wrong for reasons we shall state.

In the first place, we would respectfully agree with the proposition of law enunciated by Thomson J (as he then was) in *Tong Peng Hong v. PP* [1955] 21 MLJ 232, that a vehicle in which a drug is carried does not *ipso facto* fall within the words "anything whatsoever containing any dangerous drug" and therefore in such a case, the presumption contained in s. 37(d) does not arise.

Secondly, in the present case, the drug was not found concealed in a specially constructed compartment of the Honda, so that it could, in no way, be deemed to have been so concealed with the knowledge of the owner of the Honda or the person in charge of it at the material time, that is to say, the respondent, by reason of the presumption contained in s. 37(h).

Thirdly, having regard to the particular circumstances of the present case, the prosecution had to rely on circumstantial evidence to prove that the respondent had in his custody or under his control the seven packages (six recovered from the plastic bag found in the footwell of the rear nearside passenger's seat and one found in the console box, containing in all 578.94 g of heroin) and the six cigarettes containing traces of heroin recovered from the cigarette packet found lying on the dash board.

It is trite law that where the prosecution are relying on circumstantial evidence the onus upon it is a very heavy one and that evidence must point irresistibly to the guilt of the accused. If there are gaps in it then that will not be sufficient. (Per Pike CJ in *Chang Kim Siong v. PP* [1968] 1 MLJ 36 FC.

Turning to the evidence, although it is true that the respondent was the sole occupant of the Honda, being the driver and therefore in charge of it, the fact remains, that he was not its owner and, there was no evidence from which it could be reasonably inferred that he must have been in custody or control of the seven newspaper packages or the cigarette packet, which contained the offending exhibits.

In this context, mere knowledge of the presence of the seven newspaper packages or the cigarette packet in the Honda without more would not be sufficient to constitute custody or control thereof though it would constitute an essential step in that direction. But the position here was that there was not even proof of such knowledge much less proof of knowledge of the presence of the offending exhibits **in** the seven newspaper packages or the cigarette packet. For example, there was nothing to indicate for how long in all the respondent had been in charge of the Honda and such evidence as had been adduced indicated that he was seen only briefly at the wheel. No evidence was adduced as to whether the seven packages or the cigarette box had been dusted for fingerprints or as to whether the respondent's hands or fingernail clippings were examined for traces of heroin nor was there anything even suspicious about the behaviour of the respondent before or at the time of his arrest; for example, he made no difficulties when arrested.

We consider that it would not be an unfair summary of the case for the prosecution against the respondent, on the question whether it was proved that he was in custody or control of the seven packages or the cigarette packet, containing the offending exhibits, if we said that the evidence against him in relation thereto was, essentially, of *juxta* position. It goes without saying that such evidence, which amounts to nothing more than grave suspicion, is totally inadequate for purposes of inferring, control or even custody of the containers concerned, sufficient to attract the presumption under s. 37(d). Accordingly, on this ground alone, the learned Judge was perfectly entitled to rule, at the close of the case for the prosecution, that the respondent had no case to answer and to acquit and discharge him. A final point needs to be made.

The trial Judge appreciated correct law when he held, as he did in fact hold, that the defence are entitled, through cross examination of prosecution witnesses, to put its case at the earliest possible stage. Indeed, it behoves the defence to do so, for we need hardly say that if a defence is sprung in Court for the first time when the accused makes his defence from the witness box or the dock, so that the prosecution is taken by surprise, the accused runs the risk of being criticised for having kept his defence "up his sleeve", so to speak , and it being branded as a recent invention. Accordingly, we respectfully agree with Suffian LP when he said in *Mohd Noor bin Jantan's* case:

> The prosecution is free to tender or not in evidence the cautioned statement; but if the recording officer gives evidence the defence is entitled to cause him to tender it in evidence even though the prosecution does not itself want to introduce it as part of its case.

But, in the very next sentence, Suffian LP went on to say:

> But if the recording officer is not called by the prosecution he must be called by the defence during the course of the defence case for this purpose.

It is this sentence, which gave rise to a difficulty both in the Court below and before us, since it implies that a cautioned statement cannot be introduced in evidence through anyone other than the recording officer. We note, that further down in his judgment, Suffian LP did add something which, with respect, appears to be somewhat inconsistent with what he had said in the passage reproduced above. What he added was something which we consider both sound and wholesome and it was this:

> ... In our judgment it is immaterial whether or not the statement is a public document - for the principle is that a witness who has any document which is within his possession or power which is required by the defence and which is material to the defence, is bound to produce, and this rule applies whether or not the document is public or private - save that in the case of a document within the possession or power of Government, Crown Privilege may in certain circumstances be claimed. And it is not suggested that the cautioned statement here is protected by Crown Privilege.

If, subject to the consideration of privilege, the defence is entitled - and we consider it plainly is - to elicit by cross examination of prosecution witnesses, oral evidence, which goes either to destroy the case for the prosecution, or to support its own case, we fail to see why, it may not elicit, in the same way, documentary evidence, for the same purpose, as we see no distinction in principle between the two situations. Where, of course, a document is elicited in this way, on general principle, its author would have to be called unless he is dead or untraceable or cannot for any other satisfactory reason be called, in which case someone having personal knowledge of the contents thereof (see e.g. *Tan Siak Heng v. Rex* [1950] 16 MLJ 214) or saw him write it or is acquainted with his handwriting, would have to be called to prove its contents.

To recapitulate, in the present case, it will be recalled that the prosecution had called the investigation officer (who had in his possession or under his control the cautioned statement of the respondent), but **not** the recording officer. Counsel for the respondent had then sought to introduce the cautioned statement by way of cross examination of the investigation officer. The trial Judge acceded to that request, over the objection of the learned Deputy, the cautioned statement having been marked as a defence exhibit, being Exh. D22. In this, we consider, the trial Judge was entirely correct for even though the recording officer had not been called by the prosecution, the statement was that of the respondent who had personal knowledge of the facts stated therein and who had authenticated it by signing it. In other words, it was the respondent who was the author thereof and who had himself wished it to be admitted, it being acknowledged by him in the cautioned statement itself, that it was made voluntarily after due administration of the statutory caution.

We need hardly add that the position would have been very different, had it been the prosecution who were seeking to have admitted the cautioned statement over the objection of the defence. In such a situation it would have been incumbent upon the prosecution, during a trial within a trial to prove its admissibility, by calling, at the very least, the recording officer, and the interpreter (if there were one) to demonstrate beyond reasonable doubt that the statement was made voluntarily (see *Ibrahim v. The King* [1914] AC 599) and after due administration of the statutory caution. The accused would then be entitled to give evidence and to call witnesses, to give his own version of the circumstances under which the cautioned statement came to be made.

Having said that, we recognise that viewed from another angle, it may not be incorrect to regard the recording officer of a cautioned statement by an accused, to be also the maker of the statement while the accused would be the supplier of information contained therein for

the statement will have been brought into existence in writing in the course of the performance by the writer of a duty to record information supplied to him by the accused who may reasonably be supposed to have personal knowledge of such information.

We need hardly add that from the point of view of the general law of evidence, one of the most important exceptions to the hearsay rule in criminal cases, is the admissibility of statements by accused persons, whether cautioned or uncautioned. (See, e.g. s. 113(1), the Criminal Procedure Code; s. 37A(l), the Dangerous Drug Act 1952; s. 75(1), the Internal Security Act 1960; and s. 15(1), the Prevention of Corruption Act 1961). The admissibility of documentary hearsay like business or professional records under s. 32(b) Evidence Act 1950, or duly verified copies of entries in books of account under s. 3 Bankers' Books (Evidence) Act 1949, (Act 33) is also provided for. It would be beyond the scope of this judgment to attempt a detailed enumeration of all statutory exceptions to the hearsay rule but a few are mentioned by way of illustration.

Accordingly, with considerable regret, for the reasons stated, we are unable to accede to the submission advanced by the learned Deputy both in the Court below and here, based upon *Mohd Noor bin Jantan's* case, that unless the recording officer is called by the prosecution, the cautioned statement of the accused can, in no circumstances, be introduced during the case for the prosecution at the behest of the accused.

In the result, the appeal was dismissed and the order of acquittal and discharge affirmed.

Also found at [1992] 4 CLJ 2086